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8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
10

11 Barkley & Associates, Inc., a California  
Corporation,

12 Plaintiff,

13 vs.  
14

Quizlet, Inc., a Delaware Corporation  
15 registered in California

16 Defendants.  
17

Case No. 2:24-cv-5964

Judge: Hon. Wesley L. Hsu

Magistrate Judge: Hon. Charles F. Eick

**MEMORANDUM OF POINTS AND  
AUTHROTIES IN SUPPORT OF  
DEFENDANT QUIZLET, INC.'S  
NOTICE OF MOTION AND MOTION  
TO DISMISS PLAINTIFF'S  
COMPLAINT PURSUANT TO FRCP  
12(B)(6)**

*[Filed concurrently with Notice of Motion;  
declarations of Sean Marrer, S. Ryan  
Patterson, and Sarah Fink; and Proposed  
Order]*

**Date: November 1, 2024**

**Time: 1:30pm**

**Location: Courtroom 9B**

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In this purported copyright and trademark infringement suit, Plaintiff, Barkley  
4 & Associates (“Plaintiff”), attempts to manipulate the facts and the law to avoid a  
5 carefully crafted statute enacted by Congress to prevent exactly the kind of  
6 prosecution present in this case. Plaintiff alleges that it found its protected content on  
7 Defendant Quizlet’s (“Defendant” or “Quizlet”) website and wants that content  
8 removed. However, filing a lawsuit alleging infringement by Quizlet is a pointless  
9 endeavor—Quizlet, as a strict matter of law—cannot be liable for any infringement  
10 on its site if (1) the infringement was done at the direction and via the actions of a  
11 third-party; and (2) Quizlet puts in place statutory procedures designed to give  
12 content owners such as Plaintiff recourse if they detect infringement of their content.  
13 The accused content was posted at the direction and via the actions of third-parties,  
14 and Quizlet has followed the statutory procedures to the letter. Plaintiff’s recourse  
15 here is to file a “takedown notice” under the Digital Millenium Copyright Act  
16 (“DMCA”) with Quizlet, as it has done frequently and successfully in the past. Now,  
17 without any real hope of recovering damages, Plaintiff stopped participating in the  
18 DMCA procedure and instead filed this meritless lawsuit.

19 In the last decade of the 20<sup>th</sup> Century, as use of the internet was becoming  
20 widespread, Congress recognized that “[i]n the ordinary course of their operations  
21 service providers must engage in all kinds of acts that expose them to potential  
22 copyright infringement liability.” S. Rep. No. 105-190, at 8 (1998). Although  
23 Congress was aware that the services provided by companies are capable of being  
24 misused to facilitate copyright infringement, it refused to permit the specter of  
25 liability to chill innovation that could also serve substantial socially beneficial  
26 functions. Congress determined that “by limiting [service providers’] liability,” it  
27 would “ensure[] that the efficiency of the Internet will continue to improve and that  
28 the variety and quality of services on the Internet will continue to expand.” *Id.*

1 To that end, Congress enacted Title II of the DMCA, the Online Copyright  
2 Infringement Liability Limitation Act (OCILLA), which created four safe harbors  
3 that preclude imposing monetary liability and injunctive relief on service providers  
4 for copyright infringement on their websites. *UMG Recordings, Inc. v. Shelter*  
5 *Capital Partners Ltd. Liab. Co.*, 718 F.3d 1006, 1014 (9th Cir. 2013). Because  
6 Quizlet falls squarely into a safe harbor, it cannot be held liable for any copyright  
7 infringement that may be done at the direction and by the action of third-parties on its  
8 website. Plaintiff knows this.

9 The Court should recognize this lawsuit as Plaintiff’s attempt to circumvent  
10 Congress’ carefully crafted legal scheme by dressing up its allegations with all  
11 variations of legal theories. These allegations all boil down to allegations that cannot  
12 be maintained against Quizlet because of its protection via the safe harbor. The pled  
13 facts do not support these legal theories and, therefore, the Court should dismiss the  
14 Complaint in its entirety.

## 15 II. STATEMENT OF FACTS

16 Quizlet provides online tools for memorization and study. Quizlet’s services  
17 include a platform on which a suite of “study tools” is made available to students and  
18 teachers via desktop and mobile app. One of the primary tools includes digital  
19 flashcards created and/or uploaded by third-parties, predominantly students or  
20 teachers. This service is provided free on Quizlet’s website.<sup>1</sup> Marrer Aff. at ¶ 9-10.  
21 Quizlet’s service is available for any field of study, including math, literature,  
22 languages, science, social science, arts and humanity, and many more. It does not  
23 target nursing students (Plaintiff’s target audience), and does not offer the type of  
24 products offered by Plaintiff.

25 Plaintiff “is an international nurse practitioner (“NP”) continuing education  
26 company dedicated to providing...NP continuing education and certification

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27  
28 <sup>1</sup> Some features of the flashcard service are paid; these are not relevant to this matter. Marrer Aff. at  
¶ 10.

1 review/clinical update courses.” See [www.npcourses.com/about-us/](http://www.npcourses.com/about-us/). Plaintiff  
2 “specializes in creating test preparation materials for graduate nursing students  
3 studying to become certified nurse practitioners. Plaintiff creates a variety of study  
4 materials including printed study manuals, practice questions, digital study materials,  
5 recorded courses and more.” Compl., ¶ 1.

6 At least as early as February 2020, Plaintiff began notifying Quizlet that  
7 content posted on the Quizlet website, [quizlet.com](http://quizlet.com), infringed Plaintiff’s copyrights.  
8 Marrer Aff. at ¶ 30. The notices sent by Plaintiff were of the form required by the  
9 DMCA which provides a “takedown” procedure that copyright owners should  
10 employ when they detect content displayed online that they believe infringes their  
11 copyrights. Plaintiff has engaged in the DMCA process with Quizlet at least fifteen  
12 times between 2020 and 2023. *Id.* at 31.

13 Each time Quizlet received a proper and complete DMCA takedown notice  
14 from Plaintiff, Quizlet expeditiously removed the accused content from its website.  
15 *Id.* at 32. Quizlet recently reviewed each of these takedown notices and has  
16 confirmed that they were directed to URLs that corresponded to their primary  
17 solution—free flashcards—and were materials that were uploaded by third parties.<sup>2</sup>  
18 Marrer Aff. at ¶¶ 35-36. To the extent that the materials uploaded by third-parties  
19 infringed any Barkley content (which Quizlet does not concede), they were uploaded  
20 against the express prohibition of uploading unlicensed content that is clearly stated  
21 in Quizlet’s Terms of Service. See, <https://quizlet.com/tos>.

22 On May 2, 2024, Plaintiff sent a demand letter to Quizlet regarding alleged  
23 copyright and trademark infringement. Fink Aff. at ¶ 4. This was the first time that  
24 Plaintiff contacted Quizlet regarding any alleged infringement outside the context of  
25

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26 <sup>2</sup> Since Plaintiff began submitting DMCA notices, Quizlet received only one DMCA  
27 “counternotification,” from a user whose content was the subject of a DMCA notice submitted by  
28 Plaintiff in 2020. The material was not related to Plaintiff’s content and could not easily have been  
mistaken for nursing studies; it was related to learning an indigenous language. Plaintiff’s sworn  
DMCA notice was incorrect and improper. Marrer Aff. at ¶ 33.

1 the established DMCA takedown procedure, and the first time that Plaintiff  
2 complained in any way about alleged trademark infringement. Marrer Aff. at ¶ 42.  
3 That letter demanded that Quizlet immediately take down all allegedly infringing  
4 materials and pay \$240,000 to compensate it for prior infringement. Fink Aff. at ¶ 5.

5 On May 17, 2024, Quizlet responded to Plaintiff's letter explaining that the  
6 flashcards on its site, including the accused flashcards, are created and uploaded by  
7 third-party users, not by Quizlet. Quizlet also asserted that, under the DMCA, it  
8 cannot be liable for copyright infringement based on posts by third-parties, that at  
9 least some of the accused content may not be infringing due to the doctrine of fair  
10 use, and that Quizlet does not control or gain any financial benefit from any of the  
11 accused materials. Quizlet further asked Plaintiff why it did not engage in the DMCA  
12 process as it had done successfully in the past but received no response. Fink Aff. at  
13 ¶ 6.

14 Two months later, Plaintiff filed this action. Without explanation or support,  
15 Plaintiff increased its initial demand of \$240,000 to over \$1,000,000. Quizlet, after  
16 suggesting that Plaintiff use the statutorily prescribed takedown process, still has not  
17 received the required DMCA certification for the accused content. Quizlet repeatedly  
18 suggested that the parties engage in mediation as directed by the Court, in the hope  
19 that there could be a meeting of the minds on how quizlet.com works and how  
20 Plaintiff could use the DMCA process to remove the content from the site it believed  
21 was infringing, but Plaintiff refused. *Id.* at ¶ 8.

22 Quizlet moves this Court to dismiss all causes of action alleged in Plaintiff's  
23 Complaint.

### 24 **III. LEGAL STANDARD FOR DISMISSAL UNDER FRCP 12(b)(6)**

25 A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) "tests the legal  
26 sufficiency of the claims asserted in the complaint. The issue on a motion to dismiss  
27 for failure to state a claim is not whether the claimant will ultimately prevail, but  
28 whether the claimant is entitled to offer evidence to support the claims asserted."

1 *Long Affair Carpet & Rug, Inc. v. Liberty Mut. Ins. Co.*, 500 F.Supp.3d 1075, 1077  
2 (C.D. Cal. 2020). In analyzing a motion to dismiss for failure to state a claim, the  
3 district court “must accept all material allegations in the complaint as true and  
4 construe them in light most favorable to the non-moving party.” *Id.* at 1077.  
5 “However, the tenet that a court must accept as true all of the allegations contained in  
6 a complaint is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662,  
7 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (courts  
8 “are not about to accept as true a legal conclusion couched as a factual allegation.”).  
9 Dismissal of a complaint is proper where a plaintiff has failed to allege “enough facts  
10 to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. In  
11 line with the Supreme Court’s ruling in *Twombly* and the 9th Circuit’s interpretation  
12 thereof, this Court should grant Defendant’s motion to dismiss Plaintiff’s Complaint.

#### 13 IV. ARGUMENT

14 The Complaint alleges five causes of action; each fails to state an actionable  
15 claim, and all should be dismissed by this Court.

16 As to copyright infringement, Quizlet qualifies for a safe harbor under the  
17 DMCA, and, as a strict matter of law, cannot be held liable for any injunctive relief  
18 or monetary damages for any copyright infringement committed by third-parties on  
19 its website. Plaintiff can allege no facts that changes this unavoidable conclusion.  
20 Further, Plaintiff did not provide copies of the allegedly infringed materials with the  
21 Complaint, making it impossible to analyze whether there is any basis for the claims,  
22 falling short of the pleading requirements.

23 As to trademark infringement, any use of Plaintiff’s marks by Quizlet does not  
24 create a likelihood of confusion, the touchstone for a claim of trademark  
25 infringement. The accused materials use only the term “Barkley,” while the asserted  
26 marks are directed to “Barkley & Associates.” “Barkley” alone, to the extent it is  
27 protectable, is a weak, descriptive, mark that signifies a surname. And, Quizlet itself  
28 did not upload any of the accused material.

As to the remaining claims concerning false designation of origin, unfair competition, common law trademark infringement, and unfair business practices, these are meritless, concerning the same set of facts and subject to the same defenses presented for trademark infringement.

**A. Plaintiff Fails to Assert a Claim for Copyright Infringement Upon Which This Court May Grant Relief**

**1. Defendant Cannot Be Liable for Copyright Infringement Because it is Protected by a Safe Harbor of the DMCA**

At the outset, Quizlet cannot be held liable for monetary damages or subjected to injunctive relief for copyright infringement by third-parties because it is protected by the “safe harbor” provisions of the DMCA, 17 U.S.C. § 512(c), created by Congress to ensure the proper functioning of the internet. *UMG Recordings*, 718 F.3d at 1014.<sup>3</sup> Quizlet qualifies for this safe harbor.

The U.S. Copyright Office provides an Overview of the Safe-Harbor and the Notice-and-Takedown System. *See* <https://www.copyright.gov/dmca/>. It provides:

In the late 1990s, Congress recognized the legal uncertainty facing the nascent internet industry resulting from online service providers’ potential legal liability for copyright infringement that occurred on their services. To address this issue, Congress enacted section 512 of the Copyright Act, which (1) enabled copyright owners to have infringing online content removed without the need for litigation, and (2) facilitated the development of the internet industry by providing legal certainty for participating online service providers. Section 512 shields online service providers from monetary liability and limits other forms of liability for copyright infringement—referred to as safe harbors—in exchange for cooperating with copyright owners to expeditiously remove infringing content if the online service providers meet certain conditions.

At the threshold, to be eligible for the § 512(c) safe harbor, a service provider must show that the infringing material was stored “at the direction of the user.”

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<sup>3</sup> Filing suit instead of following the DMCA procedure subverts the intent of Congress. *See e.g., Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1072-73 (9th Cir. 2013). Plaintiff’s proper course of action is to file a DMCA notice.

1 *Mavrix Photographs, LLC v. Livejournal, Inc.*, 873 F.3d 1045, 1052 (9th Cir. 2017).  
2 It must then show that (1) it complied with § 512(i)'s notice and takedown  
3 procedure; (2) "it lacked actual or red flag knowledge of the infringing material" and,  
4 if it did gain such knowledge, "act[ed] expeditiously to remove, or disable access to,  
5 the material;" and (3) "it did not receive a 'financial benefit directly attributable to  
6 the infringing activity, in a case in which the service provider has the right and ability  
7 to control such activity.'" *Id.*

8 Quizlet has established a system and platform whereby third-parties create and  
9 upload materials directed to any field or endeavor. Quizlet does not actively  
10 participate in or supervise the creation or uploading of the content, nor does it  
11 preview, select, or edit content uploaded by third-parties. Rather, the content creation  
12 and upload are initiated entirely at the volition and at the direction of Quizlet's users  
13 (who agree to abide by the requirement not to upload copyrighted materials of  
14 others). *Marrer Aff.* at ¶ 36. This establishes the threshold for Quizlet to be eligible  
15 for the safe harbor.

16 Next, a defendant must show that "it has a working notification system, a  
17 procedure for dealing with DMCA-compliant notifications, and [that] it does not  
18 actively prevent copyright owners from collecting information needed to issue such  
19 notifications" to comply with the "notice and takedown" requirement. *Perfect 10,*  
20 *Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007).

21 Quizlet fulfills its obligations to remove material where it had actual  
22 knowledge of infringement, both as a general matter and specifically with respect to  
23 Plaintiff. At least as early as February 2020, Plaintiff began notifying Quizlet of the  
24 infringing content. Most of the notices sent by Plaintiff were of the form required by  
25 the DMCA. Plaintiff has engaged in the DMCA process with Quizlet regarding  
26 allegedly infringing materials at least fifteen times between 2020 and 2023. Each  
27 time that Quizlet receives a proper and complete DMCA takedown notice from any  
28 party, including Plaintiff, Quizlet removes the accused content expeditiously from its

1 website. Marrer Aff. at ¶ 32. Quizlet complies in all respects with this requirement  
2 under the DMCA, and has complied with the DMCA specifically based on notices  
3 from Plaintiff.<sup>4</sup> This establishes the second factor for Quizlet to be eligible for the  
4 safe harbor.

5 Finally, the defendant must show that “it did not receive a ‘financial benefit  
6 directly attributable to the infringing activity’” if it had “the right and ability to  
7 control such activity.” *Mavrix*, 873 F.3d at 1052. “To have the ‘right and ability to  
8 control,’ the service provider must exert substantial influence on the activities of  
9 users.” *UMG*, 718 F.3d at 1030. “The pertinent inquiry is not whether [the service  
10 provider] has the right and ability to control [its] *system*, but rather, whether it has the  
11 right and ability to control the *infringing activity*.” *Io Grp., Inc. v. Veoh Networks,*  
12 *Inc.*, 586 F.Supp.2d 1132, 1151 (N.D. Cal. 2008).

13 The accused material on Quizlet’s website was created and uploaded by third-  
14 parties. While Quizlet monitors and controls its *systems* as a service provider, Quizlet  
15 does not exert “substantial influence” on the allegedly infringing activity of its users.  
16 *See, e.g., Sid Avery & Associates, Inc. v. Pixels.com, LLC*, No. 18-cv-10232-CJC-  
17 JEMx, 2021 U.S. Dist. LEXIS 35620, at \*4 (C.D. Cal. Feb. 24, 2021) (citing *UMG*  
18 *Recordings*, 718 F.3d at 1030) (holding Pixels’ activity operating its website,  
19 processing payments, and transmitting order information to third-party printers  
20 showed only that it controls its operations, not the infringing activity, and therefore  
21 did not have the requisite “substantial influence on the activities of its users” to  
22 disqualify it from safe harbor protection). Further, Quizlet’s flashcard service is free,  
23 *see*, <https://help.quizlet.com/hc/en-us/articles/360041181691-Subscribing-to-Quizlet>,

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24  
25 <sup>4</sup> Plaintiff alleges that Quizlet “allows users to post copyright protected Barkley material on the  
26 Quizlet website.” Compl., ¶ 14. However, Quizlet has no responsibility to monitor its platform. 17  
27 U.S.C. § 512(m). When a defendant is informed of infringing material, it is obligated to take the  
28 material down, but it is not obligated to “investigate” to find more potentially infringing material.  
*UMG Recordings*, 718 F.3d at 1014. Further, Quizlet’s Terms of Service specifically prohibit users  
from posting unlicensed third-party content, underscoring the lack of any “allowance.” *See*  
<https://quizlet.com/tos>.

1 and Quizlet receives no financial benefit from that service.<sup>5</sup> This establishes the third  
2 factor for Quizlet to be eligible for the safe harbor.

3 Quizlet satisfies all the requirements for protection from liability under the  
4 DMCA safe harbor. There can be no properly pled cause of action for copyright  
5 liability against Quizlet because this is a pure matter of law, and, accordingly, the  
6 Court should dismiss this claim.

7 **2. The Complaint Fails to Properly Plead a Claim for Copyright**  
8 **Infringement**

9 Even assuming, *arguendo*, that a claim for copyright infringement is not  
10 entirely foreclosed (although, as explained, it is) the Complaint is insufficiently pled  
11 to support this claim.

12 Plaintiff, alleging copyright infringement under 17 U.S.C. § 501, must show  
13 that (1) it owns a valid copyright, and (2) the defendant copied the protected work.  
14 *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). A plaintiff  
15 must show causation (“volitional conduct”) by the defendant, requiring “conduct by  
16 the defendant that can reasonably be described as the direct cause of the  
17 infringement.” *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 971 F.3d 1042, 1053  
18 (9th Cir. 2020). Plaintiff’s allegations fail on every requirement.

19 **a) Quizlet Has Not Engaged in Any Volitional Conduct**

20 To show volitional conduct, a plaintiff must provide evidence “showing the  
21 alleged infringer exercised control (other than by general operation of its website);  
22 selected any material for upload, download, transmission, or storage; or instigated  
23 any copying, storage, or distribution of its photos.” *VHT, Inc. v. Zillow Grp., Inc.*,  
24 918 F.3d 723, 731 (9th Cir. 2019). Here, as a matter of absolute fact, Quizlet did not  
25 engage in volitional conduct (the accused content was uploaded by third-parties).  
26

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<sup>5</sup> That Quizlet offers this service for free refutes Plaintiff’s allegation that Quizlet is “soliciting  
people to create Quizlet accounts and pay for study materials...” Compl., ¶ 16.

**b) The Complaint Does Not Identify What, Specifically, Is  
Allegedly Being Infringed Upon**

The Complaint, not providing copies of the allegedly infringing materials, is further deficient on its face, and, therefore, fails to state a claim. Fed. R. Civ. P. 12(b)(6). A complaint “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In this situation, Courts may dismiss a copyright claim at the pleading stage. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1123 (9th Cir. 2018).

The allegedly copyrighted materials are not identifiable simply by their registration numbers provided in the Complaint and there is no way to ascertain which of Plaintiff’s allegedly protected materials are the subject of the claim. *See Jackson v. Netflix, Inc.*, 506 F.Supp.3d 1007, 1017 (C.D. Cal. 2020) (“Plaintiffs instead identify registration numbers and aver legal conclusions concerning Netflix’s infringement of the ‘Publication,’ [...] Plaintiffs inexplicably fail to provide cogent details concerning what works their registrations cover, or allege which parts of the copyrights Netflix infringed, when, and through what conduct”). The claim, insufficiently pled, must be dismissed.

**c) No Protectable Copyright of Facts**

Facts cannot be protected by copyright. *Feist Publications*, 499 U.S. at 344. Only the collections or compilations of facts may possess the originality necessary for copyright protection. 17 U.S.C. §§ 101-03. A “compilation” is “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” *Id.*

“Test preparation materials for students studying to become nurse practitioners,” as the allegedly protected content is described by Plaintiff, Compl., ¶ 7, must be factual and therefore not protectable. Assuming, *arguendo*, that Plaintiff’s

1 materials qualify as a “compilation,” which Plaintiff does not allege, any possible  
2 protection will be only in the compilation and how the facts are assembled.<sup>6</sup> The  
3 accused materials are flashcards, not assembled as “home courses, study manuals,  
4 textbooks, recordings of classes, and other study materials...in both digital and print  
5 form.” Compl., ¶ 7. For this reason, too, the Court should dismiss this claim.

6 **d) There Is No Copyright Infringement Because Any Use of**  
7 **Materials Falls into The Fair Use Exception**

8 Plaintiff’s claim of copyright infringement also fails because any use of the  
9 copyrighted material is fair use, as a matter of law. Plaintiff has not alleged any facts  
10 to the contrary, and, since no such facts exist, they cannot be revealed by discovery.

11 The fair use doctrine “permits and requires courts to avoid rigid application of  
12 the copyright statute when, on occasion, it would stifle the very creativity which that  
13 law is designed to foster.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577  
14 (1994). Under 17 U.S.C. § 107, “the fair use of a copyrighted work...for purposes  
15 such as criticism, comment, news reporting, teaching..., scholarship, or research, is  
16 not an infringement of copyright.” Courts weigh four factors in a fair use  
17 determination; here, each of these factors dictates that the accused activity is fair use.

18 The first factor, the purpose and character of the use, analyzes “whether and to  
19 what extent the new work is transformative,” adding “something new” to the first  
20 work. *Id.* at 579. Plaintiff’s products are designed to teach nursing studies; the  
21 content on quizlet.com transforms this long form content to flashcards, designed for  
22 memorization and studying, and tailored for individual students’ needs.

23 The second factor, the nature of the copyrighted work, recognizes that some  
24 works—generally creative works, like fictional stories—“are closer to the core of  
25 intended copyright protection than others.” *Id.* at 586. Works that are largely fact-  
26 based have only “thin” copyright protection. Plaintiff’s content is factual.

27 \_\_\_\_\_  
28 <sup>6</sup> Even the selection of the facts to include in the study materials are not at the discretion of  
Plaintiff—the materials are dictated by third-party-designed board exams.

1 The third factor, the amount and substantiality of the portion used in relation to  
2 the copyrighted work as a whole, looks to the quantitative amount and qualitative  
3 value of the original work used in relation to the defendant's justification for the use.  
4 *Id.* at 586-88. Flashcards are short and succinct and include a few short sentences.  
5 They highlight core facts only, without any of the surrounding material.

6 The fourth factor, the effect of the use upon the potential market for or value of  
7 the copyrighted work, considers "the extent of market harm caused by the particular  
8 actions of the alleged infringer [and] also whether unrestricted and widespread  
9 conduct of the sort engaged in by the defendant would result in a substantially  
10 adverse impact on the potential market for the original." *Id.* at 590. Flashcards cannot  
11 replace long-form teaching materials, such as textbooks, study manuals, entire  
12 courses, or full classes. Indeed, Quizlet first began offering its flashcard tool in 2015,  
13 Marrer Aff. at ¶ 14, yet Plaintiff has not pled any appreciable decline in the market  
14 for textbooks.

15 The accused uses are fair uses as a matter of law, and, for this reason too, the  
16 Court should dismiss this claim.

17 **B. Plaintiff Fails to Assert a Claim for Trademark Infringement Upon**  
18 **Which This Court May Grant Relief**

19 Plaintiff alleges trademark infringement of the marks with (1) U.S.  
20 Registration Number 6,272,223, a stylized mark that includes the words "Barkley &  
21 Associates;" and (2) U.S. Registration Number 6,270,781, a word mark "Barkley &  
22 Associates." Compl., ¶ 8. Plaintiff has never, prior to filing this lawsuit, approached  
23 Quizlet with any concern regarding trademark infringement even though it has  
24 expressed concerns about copyright infringement, underscoring the manufactured  
25 and baseless premise for this claim.

26 To prevail on a claim for trademark infringement under 15 U.S.C. § 1114, a  
27 plaintiff must prove: "(1) that it has a protectible ownership interest in the mark; and  
28 (2) that the defendant's use of the mark is likely to cause consumer confusion."

1 *Network Automation, Inc. v. Advanced Sys. Concepts*, 638 F.3d 1137, 1144 (9th Cir.  
2 2011). The “likelihood of confusion” inquiry generally considers whether a  
3 reasonably prudent consumer in the marketplace is likely to be confused as to the  
4 origin or source of the goods or services bearing the mark. *Rearden LLC v. Rearden*  
5 *Commerce, Inc.*, 683 F.3d 1190, 1209 (9th Cir. 2012). The inquiry is whether  
6 confusion is “probable, not simply a possibility.” *Cohn v. Petsmart, Inc.*, 281 F.3d  
7 837, 842 (9th Cir. 2002).

8 Here, the accused products were created and uploaded by third-parties, who,  
9 by the very act of uploading materials extraneous to Quizlet, inherently know that the  
10 materials’ source is not Quizlet. The relevant consumers are not likely to be  
11 confused.

12 **1. The Accused Use Would Not Cause a Likelihood of Confusion**

13 The test for determining a likelihood of confusion considers eight factors (the  
14 “*Sleekcraft* Factors”): (1) the strength of the mark; (2) proximity of the goods; (3)  
15 similarity of the marks; (4) evidence of actual confusion; (5) marketing channels  
16 used; (6) type of goods and the degree of care likely to be exercised by the purchaser;  
17 (7) defendant’s intent in selecting the mark; and (8) likelihood of expansion of the  
18 product lines. *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979). An  
19 analysis of each of these factors shows the lack of any possibility (let alone  
20 probability) of confusion as to the source of the materials.

21 **a) *Sleekcraft* Factor 1: Plaintiff’s Mark is Not Strong**

22 A strong mark is inherently distinctive—for example, “arbitrary or fanciful”—  
23 and is afforded the widest ambit of protection from infringing uses. *AMF, Inc.*, 599  
24 F.2d at 349. Here, the asserted marks, formed of the surname “Barkley,” are, as  
25 matter of law, not distinctive. *Quiksilver, Inc. v. Kymsta Corp.*, 466 F.3d 749, 760  
26 (9th Cir. 2006).<sup>7</sup> These marks are, instead, descriptive, not protectable unless they

27  
28 <sup>7</sup> The Examining Attorney for U.S. Trademark Registration No. 6,270,781 initially refused registration, in part, because the term “Barkley” is primarily merely a surname and is therefore

1 have acquired “secondary meaning,” such that buyers and potential buyers associate  
2 the mark with the source, not as a description, of the product. *Fleischer Studios, Inc.*  
3 *v. A.V.E.L.A., Inc.*, 654 F.3d 958, 967 (9th Cir. 2011).

4 The term “Barkley” has not gained any secondary meaning. Whether a mark  
5 has gained secondary meaning is often determined by marketplace studies and polls.  
6 Here, however, the existing evidence speaks for itself, and no study or poll is needed.

7 First, Plaintiff does not rely on its mark to gain visitors to its website: its  
8 domain, “npcourse.com,” describes nurse practitioner studies, underscoring the fact  
9 that the use “Barkley & Associates” itself would not inform a nursing student that the  
10 content of the website was relevant to that student.

11 Further, in a Google search conducted in New York in or around August 2024,  
12 for the term “Barkley,” the search results include no reference to Plaintiff or its  
13 materials in at least the first two pages. “Charles Barkley” dominates the search  
14 results, and both “Barkley the Dog” (a Sesame Street Muppet) and “The Barkley  
15 Restaurant” in Pasadena (far from the New York searcher) are higher in the results  
16 than “Barkley & Associates.” Fink Aff. at ¶¶ 11-13.

17 These search results indicate that Plaintiff’s product is neither “relevant” nor  
18 “useful” to the average user, two elements that help Google’s algorithm return search  
19 results:

20 To return relevant results, we first need to establish what  
21 you’re looking for—the intent behind your query. To do  
22 this, we build language models to try to decipher how the  
23 relatively few words you enter into the search box match up  
24 to the most useful content available.<sup>8</sup>

24 descriptive. 15 U.S.C. §1052(e)(4). Plaintiff overcame the refusal by claiming the “mark has  
25 become distinctive of the goods/services through the applicant’s substantially exclusive and  
26 continuous use of the mark in commerce...for at least five years.”  
27 <https://tsdr.uspto.gov/documentviewer?caseId=sn90042228&docId=ROA20201024184816&linkId=10#docIndex=9&page=1> Yet, Plaintiff’s use of this surname was not exclusive and Plaintiff did  
28 not have substantially exclusive use. *See above.*

<sup>8</sup> [https://www.google.com/intl/en/search/howsearchworks/how-search-works/ranking-  
results/#:~:text=To%20give%20you%20the%20most,the%20nature%20of%20your%20query](https://www.google.com/intl/en/search/howsearchworks/how-search-works/ranking-results/#:~:text=To%20give%20you%20the%20most,the%20nature%20of%20your%20query)

1 As applied to the instant case, this means that Google’s algorithm, refined over  
2 at least five years (*see id.*), and ratified by billions of users, considers Charles  
3 Barkley, a Muppet, and a restaurant in Pasadena more “relevant” and “useful” to a  
4 typical internet user in New York than Barkley & Associates, which, based on its late  
5 appearance in this list, is hardly “relevant” or “useful” at all. With respect to  
6 secondary meaning, this strongly suggests that the term “Barkley” is not associated  
7 with Plaintiff.

8 Plaintiff alleges that its marks are “famous.”<sup>9</sup> Compl., ¶ 20. Plaintiff is wrong.  
9 “Fame” requires a showing greater than mere distinctiveness or secondary meaning.  
10 *See, e.g., Aegis Software, Inc. v. 22nd Dist. Agric. Ass’n*, 255 F.Supp.3d 1005, 1011  
11 (S.D. Cal. 2017).

12 A “famous” mark is one that “is widely recognized by the general consuming  
13 public of the United States as a designation of source of the goods or services of the  
14 mark’s owner.” 15 U.S.C. § 1125(c)(2)(A). Fame is a very high bar - even very old  
15 and commercially successful marks are not “famous.” *See, e.g., Avery Dennison*, 189  
16 F.3d at 873, 876-77 (“Avery” and “Dennison” marks are not famous despite decades  
17 of use, \$3 billion in annual sales, and \$5 million in advertising); *Fruit of the Loom,*  
18 *Inc., v. Girouard*, 994 F.2d 1359, 1362-63 (9th Cir. 1993) (finding the “FRUIT”  
19 mark was “far from being in the class” of the famous marks “TIFFANY,”  
20 “POLAROID,” “ROLLS ROYCE,” “KODAK,” “CENTURY 21,” and “OSCAR.”).

21 Plaintiff’s mark is a surname. It is not associated with Plaintiff to the general  
22 consuming public. Factually and legally, the mark cannot cause a likelihood of  
23 confusion.

24 **b) Sleekcraft Factor 3: The Marks Are Not Similar**  
25  
26

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27 <sup>9</sup> Plaintiff alleges that Quizlet’s services “dilute Barkley’s famous brand.” Compl., ¶ 20. However,  
28 there can be no claim of dilution without fame. *See, e.g., Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1011 (9th Cir. 2004). There can be no dilution here.

1 Similarity of the marks is tested on three levels: sight, sound, and meaning;  
2 each must be considered *as they are encountered in the marketplace*. See *AMF, Inc.*,  
3 599 F.2d at 351. Here, Plaintiff’s website uses the two asserted marks as they are  
4 registered, *i.e.*, “Barkley” along with the words “& Associates.”<sup>10</sup> Plaintiff’s website  
5 does not use the word “Barkley” alone, as that word is used in the accused uses.  
6 Accordingly, use of the single word “Barkley” in the accused materials is unlikely to  
7 cause consumer confusion.

8 **c) *Sleekcraft* Factor 4—No Evidence of Actual Confusion**

9 “[L]ack of evidence about actual confusion after an ample opportunity for  
10 confusion ‘can be a powerful indication that the junior trademark does not cause a  
11 meaningful likelihood of confusion.’” *Cohn*, 281 F.3d at 843. The Complaint alleges  
12 actual confusion based on an email sent from Rebecca.martin@ua.edu to  
13 barkley@npcourses.com and bianca@npcourses.com. The email states:

14 I had a student email me today regarding the 3ps test taken  
15 last Friday. The student said they were looking into the  
16 Barkley 3Ps and stumbled upon “Quizlet.” The student  
17 went on to say that they reviewed the information on the  
18 site without knowing it was a direct quote from the ‘3Ps.’ I  
19 google 3ps Barkley and saw Quizlet listed on the first page.  
20 \*\*\* You may be aware of the site but I appreciate all of  
21 your help with preparing our students.

19 For context, “3Ps” is the name of a nursing qualifying exam, not the name of  
20 Plaintiff’s material, and not owned by Plaintiff. This email does not show actual  
21 confusion as to the source of the information on quizlet.com—it shows that the  
22 student found a direct quote from an exam, not owned by Plaintiff, on Quizlet’s  
23

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24 <sup>10</sup> [https://www.npcourses.com/certification-review-courses/?specialty=AGACNP&utm\\_term=&utm\\_campaign=Search-Dynamic+%7C+All+except+PNP&utm\\_source=adwords&utm\\_medium=ppc&hsa\\_acc=1247175319&hsa\\_cam=20785233301&hsa\\_grp=157195582298&hsa\\_ad=696738845882&hsa\\_src=g&hsa\\_tgt=dsa-2261946580035&hsa\\_kw=&hsa\\_mt=&hsa\\_net=adwords&hsa\\_ver=3&gad\\_source=1&gclid=CjwKCAjw6c63BhAiEiwAF0EH1JZphYols9svVDwbgunVfdYnK6N9PvGIWnirJ3itfsspNxLAEqZjpxoCbhoQAvD\\_BwE&type=live-course](https://www.npcourses.com/certification-review-courses/?specialty=AGACNP&utm_term=&utm_campaign=Search-Dynamic+%7C+All+except+PNP&utm_source=adwords&utm_medium=ppc&hsa_acc=1247175319&hsa_cam=20785233301&hsa_grp=157195582298&hsa_ad=696738845882&hsa_src=g&hsa_tgt=dsa-2261946580035&hsa_kw=&hsa_mt=&hsa_net=adwords&hsa_ver=3&gad_source=1&gclid=CjwKCAjw6c63BhAiEiwAF0EH1JZphYols9svVDwbgunVfdYnK6N9PvGIWnirJ3itfsspNxLAEqZjpxoCbhoQAvD_BwE&type=live-course).

1 website. The student was not confused as to whether the content on Quizlet’s site  
2 came from Barkley, but instead pointed out that quizlet.com, in addition to Plaintiff  
3 (and many other companies that provide study materials for the “3Ps” exam),  
4 contained some study materials for the exam. The teacher wondered if Barkley was  
5 aware of the Quizlet site—indicating her knowledge that the site was not affiliated  
6 with or endorsed by Barkley (*i.e.*, showing the exact opposite of confusion of the  
7 source). Far from evidencing actual confusion, this email correspondence instead  
8 evidences no confusion. Thus, the fourth *Sleekcraft* factor favors Defendant.

9 **d) The Remaining *Sleekcraft* Factors Show that there is No**  
10 **Likelihood of Confusion**

11 The second *Sleekcraft* factor considers the proximity of the goods, the fifth  
12 factor considers the marketing channels in which the products are offered, and the  
13 eighth factor asks whether there is a strong possibility of expansion into competing  
14 markets. For related goods, the danger presented by use of similar trademarks is that  
15 the public will mistakenly assume there is an association between the producers of  
16 the related goods, though no such association exists. *AMF, Inc.*, 599 F.2d at 350, 353.  
17 Here, Plaintiff offers digital courses and hardcopy materials for teaching nurse  
18 practitioners. Quizlet operates solely online, and does not offer any courses to teach  
19 content, but offers the ability for the user to make their own flashcards to be used to  
20 memorize and study content of any topic desired by a user. These factors,  
21 accordingly, cannot support a likelihood of confusion.

22 The sixth *Sleekcraft* factor considers types of goods and the degree of care  
23 likely to be exercised by the purchaser. When a product is expensive, consumers are  
24 likely to exercise caution before purchasing the product, resulting in a smaller chance  
25 of confusion. *See Entrepreneur Media v. Smith*, 279 F.3d 1135, 1152 (9th Cir. 2002).  
26 Here, Plaintiff’s courses and materials can cost upwards of \$589,<sup>11</sup> a high price for  
27

28 <sup>11</sup> See, e.g., <https://www.npcourses.com/45-hour-advanced-pharmacology-course/>.

1 the targeted consumers—students—who would therefore exercise great care before  
2 purchasing these materials. This factor does not support a likelihood of confusion.

3 The seventh *Sleekcraft* factor considers the defendant’s intent, important  
4 because “[a]dopting a designation with knowledge of its trademark status permits a  
5 presumption of intent to deceive,” and such intent is “strong evidence of a likelihood  
6 of confusion.” *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 184 F.3d 1107, 1111  
7 (9th Cir. 1999). Here, since the accused material was posted by third-parties on  
8 Defendant’s service against the express prohibition set forth in the Quizlet Terms of  
9 Service, Quizlet had no nefarious intent (or any intent). Accordingly, this factor  
10 cannot support a likelihood of confusion.

11 Not a single *Sleekcraft* Factor suggests any likelihood of confusion. As this is a  
12 Motion to Dismiss, the Court may accept the Plaintiff’s allegations as true. However,  
13 Plaintiff has failed to identify with particularity any facts that would support a  
14 finding in favor of Plaintiff. The Court should accordingly find that there is no  
15 likelihood of confusion and therefore no trademark infringement can result.

16 **2. Any Use of the Unprotected Word “Barkley” Was Not “Use” by**  
17 **Defendant**

18 It is well established that an internet platform that merely hosts content that  
19 may infringe a trademark is not liable for trademark infringement. *See e.g., YZ Prods.*  
20 *v. Redbubble, Inc.*, 545 F.Supp.3d 756, *passim* (N.D. Cal. 2021). Quizlet.com is such  
21 a platform. It does not, as part of its regular business, create or upload flashcards and  
22 merely hosts the online platform for third-parties to post content. Marrer Aff. at ¶¶  
23 13, 39. Oddly, Plaintiff alleges that Quizlet has violated its rights by relying on a  
24 screenshot from an unrelated, third-party website, studypool.com. Compl., ¶ 12.  
25 Quizlet has no affiliation or association with this site. Marrer Aff. at ¶ 38. Plaintiff  
26 points to the phrase, “Study online at [https://quizlet.com/...](https://quizlet.com/)” written in small letters  
27 on a flashcard that was found on studypool.com to assert an association between  
28 Quizlet and this post on a completely unrelated site. This phrase, however, is

1 standard on all user-created materials that are printed from quizlet.com, is directed to  
2 the user itself and does not evidence any malfeasance by Quizlet. Marrer Aff. at ¶ 12.  
3 There is no evidence alleged to suggest that Quizlet “created” the materials or  
4 “plastered the Quizlet name” on materials to “entice users to visit the Quizlet site  
5 instead of Barkley.” Compl., ¶¶ 11-12. And, indeed, there can be no evidence of this  
6 because the allegations are false.

7 Therefore, the trademark infringement claim fails also because Quizlet has not  
8 in any way directly used the trademarks.

9 **3. Any Use of the Unprotected Term “Barkley” is a Fair Use and Not**  
10 **Infringing**

11 The doctrine of fair use provides an affirmative defense to a defendant accused  
12 of federal trademark infringement. 15 U.S.C. §§ 1115(b)(4), 1125(c)(3)(A). To  
13 successfully assert this defense, a defendant must show it is (1) not using the term as  
14 a trademark or service mark; (2) using the term fairly and in good faith; and (3) using  
15 the term only to describe its goods or services. *Cairns v. Franklin Mint Co.*, 292 F.3d  
16 1139, 1150-51 (9th Cir. 2002).

17 Here, the use of the asserted marks is descriptive fair use, used only to identify  
18 the source of the materials to the their-party who used the materials. Any use was in  
19 good faith, done by a third-party as a study aid.

20 For all these reasons, Plaintiff’s claim for trademark infringement fails and  
21 should be dismissed.

22 **C. Plaintiff Fails to Assert a Claim for Its Remaining Three Claims Upon**  
23 **Which This Court May Grant Relief**

24 Plaintiff alleges false designation of origin/unfair competition under 15 U.S.C.  
25 § 1125(a), trademark infringement under California common law, and unfair  
26 business practices under California Business & Professions Code § 17200. These  
27 claims all fail as they rise and fall with the federal trademark infringement claim  
28 since they are analyzed in the same way. “To prove trademark infringement under 15

1 U.S.C. § 1114, false designation of origin under 15 U.S.C. § 1125, and by extension,  
2 the related unfair business practices and common law infringement claims, a plaintiff  
3 must prove the defendant’s use of the same or similar mark would create a likelihood  
4 of consumer confusion.” *Charisma Brands, LLC v. AMDL Collections, Inc.*, No.  
5 8:19-cv-00312-JLS-KES, 2019 U.S. Dist. LEXIS 208192, at \*10 (C.D. Cal. Sep. 3,  
6 2019). Since there can be no likelihood of consumer confusion, as noted above after  
7 evaluating the *Sleekcraft* factors, these claims must fail.

8 **1. Plaintiff Fails to Assert a Claim for False Designation of**  
9 **Origin/Unfair Competition**<sup>12</sup>

10 To prevail on a claim of false designation of origin under 15 U.S.C. § 1125(a),  
11 a plaintiff “must prove that [the] [d]efendant used in commerce any word, term,  
12 name, symbol, or device, or any combination thereof, or any false designation of  
13 original, false or misleading description of fact, which is likely to cause confusion, or  
14 to cause mistake, or to deceive as to the affiliation, connection, or association of  
15 [d]efendant with [p]laintiffs, or as to the origin, sponsorship, or approval of his goods  
16 by [p]laintiffs.” *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F.Supp.2d 1172, 1176 (C.D.  
17 Cal. 2002); *see also Kythera Biopharmaceuticals, Inc. v. Lithera, Inc.*, 998 F.Supp.2d  
18 890, 897 (C.D. Cal. 2014) (“A claim for false designation of origin under 15 U.S.C. §  
19 1125 requires proof of the same elements as a claim for trademark infringement  
20 under 15 U.S.C. § 1114.”).

21 Quizlet has not used any term owned by Plaintiff. The accused uses on  
22 quizlet.com specifically state the source of the material. Further, as explained, there  
23 is no likelihood of confusion. Quizlet’s liability and defense for this claim are,  
24 therefore, substantially the same as those discussed in the section of the claim for  
25

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26 <sup>12</sup> Quizlet is also not liable for this claim under the Communications Decency Act (CDA), Section  
27 230, which protects internet platforms from liability based on content posted on the platform by  
28 others. 47 U.S.C. § 230. Section 230 is applicable for claims of false designation of origin/unfair  
competition. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100-01 (9th Cir. 2009).

1 trademark infringement under 15 U.S.C. § 1114, and the court should, accordingly,  
2 find that Quizlet is not liable for false designation origin or unfair competition.

3 **2. Plaintiff Fails to Assert a Claim for Common Law Trademark**  
4 **Infringement**

5 Trademark claims under California law are “substantially congruent” with  
6 federal claims and thus lend themselves to the same analysis. *Grupo Gigante S.A. de*  
7 *C.V. v. Dallo & Co.*, 391 F.3d 1088, 1100 (9th Cir. 2004).

8 A claim under California common law for trademark infringement applies only  
9 to unregistered marks. *Id.* To prevail on this claim, “a plaintiff must allege two  
10 elements: first, that the plaintiff owns a valid and protectible trademark; and second,  
11 that a defendant used, in commerce, a similar mark without authorization in a manner  
12 that is likely to cause consumer mistake, confusion, or deception.” *So. Cal. Darts*  
13 *Ass’n v. Zaffina*, 762 F.3d 921, 929 (9th Cir. 2014). Plaintiff here fails to describe  
14 any alleged common law marks and none are readily discernible. Quizlet has not  
15 used the mark. As explained, there is no likelihood of confusion. Therefore, Plaintiff  
16 fails to successfully assert any claim for trademark infringement in accordance with  
17 the laws of the State of California, there is no common law trademark infringement  
18 and the Court should, accordingly, dismiss this claim.

19 **3. Plaintiff Fails to Assert a Claim for Unfair Business Practices**

20 A claim for unlawful conduct under Cal. Bus. & Prof. Code § 17200 “borrows  
21 violations of other laws and treats them as unlawful practices that the unfair  
22 competition law makes independently actionable.” *Wilson v. Hewlett-Packard Co.*,  
23 668 F.3d 1136, 1140 (9th Cir. 2012). This claim rises and falls along with the other  
24 claims and, therefore, Quizlet has no liability for this claim.<sup>13</sup>

25 **V. CONCLUSION**  
26

27  
28 <sup>13</sup> Plaintiff alleges that Quizlet misappropriated and used “Barkley’s protected marks, trade dress,  
copyrights, label, artwork, design, and related protected works...” Compl., ¶ 101. However,

1 For the foregoing reasons, Quizlet respectfully requests that this Court dismiss  
2 Plaintiff's Complaint in its entirety for failing to state claims upon which relief can  
3 be granted pursuant to Fed. R. Civ. P. 12(b)(6).

4 Dated: September 30, 2024

5 Respectfully submitted,

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28 Plaintiff does not identify these, nor can Quizlet identify them, foreclosing the possibility of  
infringement.

**CERTIFICATE OF COMPLIANCE**  
**PURSUANT TO LOCAL RULE 11-6.2**

The undersigned, counsel of record for Defendant Quizlet, Inc., certifies that this brief contains six thousand, nine hundred, ninety-five words, which complies with the word limit of L.R. 11-6.1.

Dated: September 30, 2024

Respectfully submitted,  
By: /s/ Ryan Patterson  
Ryan Patterson

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that counsel of record who are deemed to have consented to electronic service are being served with a copy of the foregoing via the Court's CM/ECF system on September 30, 2024.

/s/ Ryan Patterson  
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